No. 75-1295

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENNETH J. BRYZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 522 F.2d 414.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1975. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 12, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on March 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by permitting the government to introduce into evidence the fact that two co-defendants pleaded guilty to the same

offense with which petitioner was charged, after cross-examination by the defense of an indicted co-conspirator elicited the fact that he had not been prosecuted for the offense.

2. Whether the mail fraud statute prohibits use of the mails for the purpose of transmitting "kickbacks" on supply contracts.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 39 counts of mail fraud, in violation of 18 U.S.C. 1341, and on one count of using a false name to carry out the mail fraud scheme, in violation of 18 U.S.C. 1342.[1] He was sentenced to concurrent terms of one year's probation on each count, with a special condition that the first 177 days were to be served in the custody of the Attorney General, and was fined a total of $5,000. The court of appeals affirmed (Pet. App. A).

The evidence showed[2] that petitioner was employed by International Harvester Company as a purchasing agent. In that capacity, without the knowledge of International Harvester, petitioner accepted payments from suppliers in return for his implied assurance that International Harvester would continue to purchase their products.[3] The payments included $18,000 from Marvin Nathan, a sales representative of a number of suppliers; approximately $4,500 from Max Selzer, president of another supplier; approximately $6,000 from the Polydoris brothers, owners of a third supplier; and $125 per month from Yeadon Mason, president of a fourth supplier.[4] The payments were sent through the mails to a company that petitioner owned, which he organized to receive such payments. When International Harvester learned of the payments, it summarily discharged petitioner.

[1]Petitioner was charged in four indictments. Prior to trial, eight of the mail fraud counts were dismissed on the government's motion. Petitioner was convicted on all the remaining counts, each of which, except the one count alleging a violation of 18 U.S.C. 1342, charged a single mailing in execution of the scheme (Pet. App. 3a and n. 4).

[2]This brief statement of the facts is derived from the opinion of the court of appeals (Pet. App. 1a-13a).

ARGUMENT

1. Petitioner contends that the court erred in permitting the government to introduce into evidence the fact that two co-defendants had pleaded guilty to the same offense with which petitioner was charged. During cross-examination of Stewart Polydoris, defense counsel elicited the fact that although the Polydoris brothers had been named with petitioner in the indictment, they had not

[3]Under the terms of his employment contract, petitioner was prohibited from "* * * seek[ing] or accept[ing] or * * * offer[ing] to provide directly or indirectly from or to any individual, partnership, association, corporation or other business entity or a representative thereof doing or seeking to do business with the company, or any affiliate of the company loans, except with banks or other financial instructions, services, payments, excessive entertainment and travel, vacation or pleasure trips, or any gift of more than nominal value or gifts of money in any amount" (Pet. App. 11a-12a n. 7).

[4]Nathan and Selzer were indicted with petitioner and charged on thirteen counts of mail fraud. Each of them pleaded guilty and was sentenced to a term of three years' probation and a fine of $1,000. Mason was charged on ten counts of mail fraud but subsequently was acquitted in a jury trial (*id.* at 2a-3a n. 3).

been prosecuted. Thereafter, over defense objection,[5] the court permitted the government to elicit from both Nathan and Selzer the fact that each of them also had been named in the indictment and had pleaded guilty (Pet. App. 20a-21a). Immediately after each witness so testified, the court carefully instructed the jury that the fact that the witness had pleaded guilty was not to be considered as evidence of petitioner's guilt. During its charge to the jury, the court again instructed the jury (Pet. App. 22a):

> As I told you before, the fact that a co-defendant pleads guilty is not evidence of the guilt of this defendant or that the crime charged in the indictment was committed. The guilt or innocence of the defendant on trial must be determined by you solely by the evidence introduced in the trial of this case which has just concluded.

It is established that the court has discretion to admit evidence of the guilty plea of co-defendants. *United States* v. *Lewis*, 524 F.2d 991, 992 (C.A. 5); *United States* v. *Kubitsky*, 469 F.2d 1253, 1255 (C.A. 1), certiorari denied, 411 U.S. 908. There was no abuse of discretion in the instant case. When the defense elicited the fact that the Polydoris brothers had been indicted but had not been prosecuted, it opened the door to the subject of criminal proceedings that the government had brought against others who were indicted with petitioner. As the court of appeals noted (Pet. App. 21a):

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[5]Prior to the testimony of Selzer and Nathan, petitioner moved to exclude any testimony concerning their pleas of guilty. In making this motion, petitioner said he would give up his right to cross-examine the witnesses concerning their pleas, and therefore would not make any attempt to impeach their credibility by bringing out their convictions. The trial judge denied the motion (Pet. App. 20a).

> Had the information that Selzer and Nathan were charged and convicted not been brought to the jury's attention, the plain inference which the jury would have been left to draw was that all parties to the charged scheme, save [petitioner], were permitted by the government to go unpunished for their illegal activities.

Moreover, the court's cautionary instructions eliminated any substantial possibility that petitioner might be improperly prejudiced by the admission of this evidence. See *United States* v. *King*, 505 F.2d 602, 607 (C.A. 5).

Petitioner further contends that admission of evidence of the guilty pleas of co-defendants, when the defense elicits the fact that a co-indictee has not been prosecuted, impermissibly penalizes the defendant's Sixth Amendment right to confrontation. What petitioner characterizes as a penalty, however, is merely a strategic disadvantage that may flow from a tactical decision by the defense to open the subject of criminal proceedings brought against other indictees, analogous to any other strategic disadvantage that may result when the defense decides to open the door to certain subjects, such as prior convictions or reputation. Cf. *Walder* v. *United States*, 347 U.S. 62, 64; *Michelson* v. *United States*, 335 U.S. 469, 479, 485; *McGautha* v. *California*, 402 U.S. 183, 213.[6]

2. Petitioner contends that the government's proof did not establish a violation of the mail fraud statute, since it was not shown that his acts caused his employer to lose business, profits, or good will. 18 U.S.C. 1341 provides, in pertinent part, that it shall be illegal to "[devise]

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[6]Petitioner's reliance on *Smith* v. *Illinois*, 390 U.S. 129, and *Alford* v. *United States*, 282 U.S. 687, is misplaced, for in those cases the scope of cross-examination was curtailed. Here, by contrast, cross-examination was not curtailed.

or [intend] to devise any scheme or artifice to defraud" and to use the mails in furtherance of such scheme. The provision encompasses any act or scheme of deception that causes detriment to a party that relies upon it, and that entails use of the mails. *United States* v. *Carter,* 217 U.S. 286, 308. In the instant case, petitioner's employer relied upon the fact that petitioner undertook, as its purchasing agent, to obtain for it supplies at lowest cost. But the payments to petitioner from the suppliers, to ensure continued business with petitioner's employer, represented a portion of the price which the employer paid for the supplies. Even if this price was competitive, petitioner's employer was entitled to the profit that petitioner enjoyed; petitioner's "kickback" therefore resulted in a real detriment to the employer. See *United States* v. *Drumm,* 329 F.2d 109, 113 (C.A. 1); *United States* v. *Bowen,* 290 F.2d 40, 44-45 (C.A. 5); *United States* v. *George,* 477 F.2d 508 (C.A. 7), certiorari denied, 414 U.S. 827.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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